88-2032

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the

Supreme Court

of the

United States

NICHOLAS H. MORLEY; INTERTERRA, INC.,
a Delaware corporation;
REGINA INTERIORS, INCORPORATED,
a Florida corporation; and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRUCE S. ROGOW, Esquire
NOVA UNIVERSITY LAW CENTER
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465
and
DENNIS ALAN RICHARD, Esquire
RICHARD AND RICHARD
825 South Bayshore Drive
Tower III—Suite 1748
Miami, Florida 33131
(305) 374-6688
Counsel for Petitioners

QUESTION PRESENTED

I.

UNDER ARTICLE III, §2 OF THE CONSTITUTION, DOES A BORROWER WHO IS SUED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) HAVE STANDING TO QUESTION WHETHER THE FDIC ACQUIRED ITS LOAN PURSUANT TO A FEDERAL STATUTE WHICH, IF APPLICABLE, WOULD DENY THE BORROWER OTHERWISE AVAILABLE AFFIRMATIVE DEFENSES TO THE SUIT?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below are contained in the caption of this Petition. In addition, a Receiver, John M. Lundsten, was appointed in the District Court.

The Rule 28.1 list of parent companies, subsidiaries and affiliates of the Petitioners are:

U.S. Development Corp.

N.H. Morley & Co.

Interterra Realty, Inc.

Morley Realty Corporation

The Corporation for Economic Development

Interterra Developers, Ltd.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF CITATIONS	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING CERTIORARI	8
THE DECISION BELOW CONFLICTS WITH THE STANDING DECISIONS OF THIS COURT, AND PRESENTS IMPORTANT, BUT UNANSWERED QUESTIONS WHICH MUST BE RESOLVED BY THIS COURT.	
A. *The Conflict*	8
B. *The Important And Unanswered Questions*	12
CONCLUSION	15
APPENDIX	App. 1-43

TABLE OF CITATIONS

PAGE

Association of Data Processing Service Organizations, Inc. v. Camp,
397 U.S. 150 (1970) 12

Boston Stock Exchange v. State Tax Commission,
429 U.S. 318 (1977) 13

Clarke v. Securities Industry Association,
479 U.S. 388 (1987) 12, 13

FDIC v. W. H. Venture,
607 F.Supp. 473 (E.D. Pa. 1985) 8

FDIC v. Main Hurdman,
655 F.Supp. 259 (E.D. Cal. 1987) 8

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 8, 9

Sierra Club v. Morton,
405 U.S. 727 (1972) 9

Simon v. Eastern Kentucky Welfare Rights Org.,
426 U.S. 38 (1976) 8, 10, 11

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) 6, 8, 9

Warth v. Seldin,
422 U.S. 490 (1975) 10, 11

OTHER

Title 12 U.S.C. §1823 ..... *passim*

NO.

in the

Supreme Court

of the

United States

NICHOLAS H. MORLEY; INTERTERRA, INC.,
a Delaware corporation;
REGINA INTERIORS, INCORPORATED,
a Florida corporation; and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 867 F.2d 1381 (11th Cir. 1989). The opinion is reprinted in the Appendix.

JURISDICTION

The decision of the Court of Appeals was rendered on March 16, 1989. This petition has been filed within the time prescribed by 18 U.S.C. §2101(c). The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE III.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS INVOLVED

TITLE 12 U.S.C. §1823(e)

No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it *under this section*, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes

of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank. [Emphasis added.]

* * *

TITLE 12 U.S.C. §1823(c)

(c) Assistance to insured banks

(1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured bank—

(A) if such action is taken to prevent the closing of such insured bank;

(B) if, with respect to a closed insured bank, such action is taken to restore such closed insured bank to normal operation; or

(C) if, when severe financial conditions exist which threaten the stability of a significant number of insured banks or of insured banks possessing significant financial resources, such action is taken in order to lessen the risk to the Corporation posed by such insured bank under such threat of instability.

(2)(A) In order to facilitate a merger or consolidation of an insured bank described in subparagraph (b) with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an

insured institution, or the acquisition of the stock of such insured bank, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—

(i) to purchase any such assets or assume any such liabilities;

(ii) to make loans or contributions to, or deposits in, or purchase the securities of, such insured institution or the company which controls or will acquire control of such insured institution;

(iii) to guarantee such insured institution or the company which controls or will acquire control of such insured institution against loss by reason of such insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured bank or by reason of such company acquiring control of such insured bank; or

(iv) to take any combination of the actions referred to in subparagraphs (i) through (iii).

STATEMENT OF THE CASE

In 1984 the Federal Deposit Insurance Corporation adopted a financial assistance program to aid the Continental Illinois Bank and Trust Company of Chicago. Nicholas Morley and his companies had borrowed approximately $37,000,000 from Continental in 1980 and 1981, and in the summer of 1986, Morley allegedly owed Continental $31,000,000. In February, 1987, pursuant to the FDIC assistance plan, Continental transferred Morley's loan to the FDIC and in March, 1987, the FDIC sued Morley to collect the debt and foreclose on the collateral. The FDIC asserted it had acquired Morley's loan under Title 12 U.S.C. §1823(c) and was therefore entitled to the Title 12 U.S.C. Section 1823(e) affirmative defense shield.

Morley denied the FDIC assertion, raised various affirmative defenses to the suit, and counterclaimed, seeking a declaratory judgment as to whether the FDIC had acquired Morley's loan under 12 U.S.C. §1823(c). Morley recognized that 12 U.S.C. §1823(e) precluded most affirmative defenses against the FDIC, if the FDIC had acquired his loan "under this section [1823(c)]." Pet. App. 10.

The FDIC moved to strike the affirmative defenses and the counterclaim, contending Morley had no standing to ask the "under this section" question.

The district court agreed. It concluded Morley had no standing to question whether his loan was acquired under Section 1823(c), therefore §1823(e) applied. Consequently the court struck the affirmative defenses, dismissed the counterclaim, and granted summary judgment to the FDIC. Pet. App. 26-41.

The Court of Appeals affirmed. It held that the loss of affirmative defenses was not sufficient to provide Morley with standing to raise the question of whether or not the FDIC

had taken his loan under the aegis of §1823(c). Acknowledging that the "standing doctrine remains an elusive concept," the court concluded that Morley's loss of affirmative defenses (1) "does not constitute the specific injury necessary to confer Article III standing" (Pet. App. 15); (2) that the "loss of defenses is not fairly traceable to the assistance program" (Pet. App. 16); (3) that "judicial relief would likely not restore Morley's affirmative defenses" (Pet. App. 18). Therefore the Court of Appeals found Morley had failed the *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) constitutional test of standing. (Pet. App. 14-21).

The Court of Appeals also held "that prudential considerations divest Morley of standing even if he satisfies the constitutional elements." The Court found that as a borrower-debtor, Morley was "outside. . .§1823's zone of interests":

> In fact Congress enacted section 1823 to protect the FDIC against debtors' claims. Thus, allowing Morley to challenge the assistance program would violate the *Clarke* [*v. Securities Industry Assn.*, 479 U.S. 388,399 (1987)] test because Morley's interests are patently inconsistent with section 1823.
>
> Pet. App. 24.

Finally, the Court of Appeals, in a section entitled "Common Sense Supports No Standing," concluded:

> Allowing borrowers to challenge FDIC financial assistance programs to failing banks would not only slow the FDIC, but would render the FDIC completely ineffective.
>
> Pet. App. 24.

Certiorari is sought to review the Court of Appeals decision that a borrower is prohibited from even asking a federal court to determine if the FDIC acquired his loan under a statute which, if applicable, would preclude the borrower from presenting otherwise available affirmative defenses, but if not applicable, would enable the borrower to assert those defenses.[1]

---

[1]The Court of Appeals did not address either side's arguments on whether the FDIC assistance plan proceeded under §1823(c), acknowledging that standing questions are analyzed "on a complaint's allegations without considering the litigant's likelihood of success on the merits." Pet. App. 13. The opinion mentions that "Morley quotes several documents which allegedly demonstrate that the FDIC did not comply with section 1823." Pet. App. 13. We set forth below a brief excerpt from the Petitioner's Brief because common sense suggests that a feel for the merits is helpful in the elusive area of standing.

On July 26, 1984 the FDIC approved an agreement to assist Continental, an agreement which prompted Donald T. Regan, then Treasury Secretary, to write to Paul Volcker, then Chairman of the Federal Reserve Board:

> [W]e oppose proceeding with the Continental Illinois assistance package. . . .We believe it is bad public policy, would be seen to be unfair vis-a-vis past FDIC/Federal Reserve Bank supervisory policies, and represents an unauthorized and unlegislated expansion of federal guarantees in contravention of Executive Branch policy which lacks explicit Congressional authorization. (RE 125).

Secretary Regan's letter was based on the advice of the Acting General Counsel to the Treasury who concluded:

> In light of the existence of at least one alternative financing plan that is clearly legal and the serious legal questions raised by the FDIC's proposed plan, the sounder legal course would be to choose one of the alternatives. (RE 136).

Pet. App. 43.

REASONS FOR GRANTING CERTIORARI

THE DECISION BELOW CONFLICTS WITH THE STANDING DECISIONS OF THIS COURT, AND PRESENTS IMPORTANT, BUT UNANSWERED QUESTIONS WHICH MUST BE RESOLVED BY THIS COURT.

A. *The Conflict*

The decision below utilizes the analytical framework constructed by this Court in *Valley Forge Christian College*, 454 U.S. 464,472 (1982) but applies it in a fashion inconsistent with this Court's decisions.

Simply put, the issue is whether a citizen whose ability to defend a thirty million dollar lawsuit depends upon whether the FDIC acted pursuant to a specific statute, can ask a federal court to determine if the FDIC acted pursuant to that statute. None of this Court's discussions of standing support the Court of Appeals' view that the question cannot be asked. Indeed, the Court of Appeals' decision rests on two district court cases,[2] not the decisions of this Court.

The three "irreducible minimum[s]" of standing are: [1] a showing by the party invoking the court's authority " 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91,99 (1979), and that [2] 'the injury fairly can be traced to the challenged action' and [3] 'is likely to be redressed by a favorable decision, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 38,41 (1976).' " *Valley Forge Christian College*, 454 U.S. at 472.

---

[2] *FDIC v. W.H. Venture*, 607 F.Supp. 473, 475-76 (E.D. Pa. 1985) and *FDIC v. Main Hurdman*, 655 F.Supp. 259,270 (E.D. Cal. 1987).

If §1823(e)'s preclusion of defenses did not apply to Morley's loan because the FDIC did not take that loan under section 1823(c), Morley would have his affirmative defenses. Morley's request that a federal court determine whether the FDIC took his loan under section 1823(c) meets the irreducible minimum. However the Court below found otherwise. As to actual injury, it said:

> Because Morley's alleged harm is the natural consequence of a valid congressional enactment, the loss of his affirmative defenses does not constitute the specific injury necessary to confer Article III standing.
>
> Pet. App. 15.

That response misreads Morley's claim. Morley conceded his defenses were lost if his loan was taken under section 1823(c). His claim was that it was not taken under that section. If it was not, then he would not lose his defenses. Properly read, Morley's claim meets the "injury in fact" and "distinct and palpable injury" tests of *Sierra Club v Morton*, 405 U.S. 727,740 (1972), and *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100. *See, Valley Forge Christian College*, 454 U.S. at 473,475.

The misreading of Morley's claim and misapplication of this Court's decisions was compounded when, addressing the "fairly traceable" element, the Court below wrote:

> Morley's loss of defenses is not fairly traceable to the assistance program, but rather Morley's injury resulted from his failure to place the alleged modifications [of the loan agreement] in writing [as required by §1823(c)].
>
> Pet. App. 16.

Once again, if Morley's loan was not taken under section 1823(c) the loss of defenses "fairly can be traced to the challenged action. . . ." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38. And, if Morley's challenge to the FDIC claim that it took his loan under section 1823(c) was heard, then a "favorable decision" would provide redress by allowing the otherwise available defenses. *Id.*, at 41.

The decision below sought to circumvent the import of this Court's plain words on standing by speculating about what might occur if Morley were allowed to be heard on his denial of the FDIC's allegation that it took his loan under section 1823(c). Thus, while recognizing the *Warth v. Seldin*, 422 U.S. 490,500 (1975) admonition that standing be determined without considering the merits, the Court below canvassed the Continental assistance plan and found that it was within section 1823(c), or even if it were not, Morley would lose on the merits:

> Even if Morley could prove that the capital infusion fell outside section 1823(c), the FDIC acquired his loan under the assistance program's delayed loan acquisition program; the FDIC conducted this second part of the plan pursuant to section 1823(c). Consequently, Morley would have lost his defenses even without the allegedly improper infusion of capital into CIC.
>
> Pet. App. 18.

* * *

> Even if the district court found that the CIC capital infusion did not comply with section 1823(c), Morley likely would not regain his defenses. First, the court could separate the assistance program's third part from the loan acquisition program because the FDIC clearly acquired the Continental loans, including Morley's loan, under section 1823(c). Therefore, section 1823(e) would still bar Morley's defenses.

> Second, the court could hold that the assistance program constituted a valid plan even though the CIC capital infusion placed the entire plan outside section 1823(c). Under this scenario, Morley would not gain relief. Federal common law would likely bar Morley's defenses if the court concluded that the Continental assistance program was valid but not conducted pursuant to section 1823(c).
>
> Pet. App. 20.
> (footnote omitted).

Those excursions into the merits, into what a court might "likely" conclude about the assistance plan or federal common law, conflicted with the standing test fashioned by this Court. In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 2642 (1976), the Court found a complaint which "alleged only that petitioners [the I.R.S.] by the adoption of Revenue Ruling 69-545 had 'encouraged' hospitals to deny services to indigents" to be too speculative to support standing:

> Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners. Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire.

Id., 426 U.S. at 45-46. In *Warth v. Seldin*, 422 U.S. 490, 507 (1975) there was no standing because the plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [defendants] acted otherwise and might improve were the court to afford relief."

Morley's claim that his loan was not taken under section 1823(c) has record support. *See*, n.1, *supra*. The plain language of section 1823(e) (that it only applies to assets acquired by the FDIC under section 1823(c)) clearly distinguishes Morley's claim from those remote and speculative allegations in *Simon v. Eastern Kentucky* and *Warth v. Seldin*. True, a court considering the merits might construct other barriers precluding Morley from asserting his affirmative defenses. But that is a decision which *follows* standing; it does not determine standing.

By engaging in speculation about the "likely" ultimate result of Morley's claim that his loan was not taken "under this section [1823(c)]," the court below leap-frogged over the "Article III requirement of actual or threatened injury amenable to judicial remedy" which Morley clearly met, into conflict with this Court and the Constitution.

B. *The Important And Unanswered Questions*

There are two. The first is whether in a non-Administrative Procedure Act case, the *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150,153 (1970) and *Clarke v. Securities Industry Association*, 479 U.S. 388,399 (1987) "zone of interests" test should cut against Article III standing. The second question is whether a "common sense" concern for effective governmental action can prevent a citizen from having standing to ask if the governmental action was authorized by Congress.

The Court below found Morley to have no standing because his interest in asserting his defenses was not within "section 1823's zone of interests." Pet. App. 24.

> In fact, Congress enacted section 1823 to protect the FDIC against debtors' claims. Thus, allowing Morley to challenge the assistance program would violate the *Clarke* test because Morley's interests are patently inconsistent with section 1823.
>
> Pet. App. 24.

The fact that Morley's interests are inconsistent with section 1823 underscores the true Article III case and controversy generated by Morley's attempt to assert defenses. Using that controversy to deny him standing under a "zone of interest" analysis is a misuse of that test.

"The principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of [the Administrative Procedure Act, 5 U.S.C.] §702." *Clarke v. Securities Industry Association*, 479 U.S. at 400 n.16.

The test neither supplants nor supplements an actually injured party's standing to question whether he or she should be made to suffer the complained of injury. Using the "zone of interest" test to shield governmental conduct from judicial review because the complainant's interest is adverse to the government interest destroys the heart of the case and controversy notion.

The Court has "occasionally listed the 'zone of interest' inquiry among general prudential considerations bearing on standing, see, e.g. *Valley Forge Christian College*. . .and ha[s] on one occasion conducted a 'zone of interest' inquiry in a case brought under the Commerce Clause, see, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318,320-321 n.3 (1977)." *Clarke v. Securities Industry Association*, 479 U.S. at 400 n.16.

If the "zone of interest" test applies to a non-APA, traditional case or controversy, and if it can destroy standing because the complaining party's adversity to the government is inconsistent with the government's interest, then this Court should address those important, and unanswered questions.

The same rationale for review applies to the "Common Sense Supports No Standing" test used below.

> Common sense supports this conclusion. Speed is essential for the FDIC when faced with an imminent bank failure. Allowing borrowers to challenge FDIC financial assistance programs to failing banks would not only slow the FDIC, but it would render the FDIC completely ineffective.
>
> Pet. App. 24.

We do not dispute the importance of the government interests in banking. But Article III, §2, and the decisions of this Court, do not make standing to sue a test which turns on the needs of government. If that were the case the government could trump Article III, §2 whenever "common sense" suggests that citizens should not question governmental action.

CONCLUSION

The decision below conflicts with the standing decisions of this Court. It rests on important, but unanswered questions regarding the roles of the "zone of interest" test and "common sense" in determining the contours of Article III, §2 standing. Certiorari should be granted to review the decision below.

Respectfully submitted,

BRUCE S. ROGOW, Esquire
NOVA UNIVERSITY LAW CENTER
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465
and
DENNIS ALAN RICHARD, Esquire
RICHARD AND RICHARD
825 South Bayshore Drive
Tower III—Suite 1748
Miami, Florida 33131
(305) 374-6688

Counsel for Petitioners

BY: _____
BRUCE ROGOW

June 14, 1989

Appendix

[1770]

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Counter-Defendant-Appellee,

v.

Nicholas H. MORLEY, Interterra, Inc., Regina Interiors, Incorporated, City National Bank of Miami, a national bank as Trustee of a land trust known on the Trustee's record as Trust No. 5003138. Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs-Appellants.

Continental Illinois National Bank and Trust Company of Chicago, a national banking association. Third-Party Defendant,

Villa Regina Association, Inc.,
Defendant.

No. 88-6012.

United States Court of Appeals,
Eleventh Circuit.

March 16, 1989.

Federal Deposit Insurance Corporation, having acquired bank's loan to borrowers as part of financial assistance program to bank, brought action to collect outstanding amount and to foreclose on property used as collateral for loan. The United States District Court for the Southern District of Florida, No. 87-511-CIV-CCA, C. Clyde Atkins, J., granted summary judgment for FDIC, and borrowers appealed. The Court of Appeals, Hatchett, Circuit Judge, held that borrowers lacked standing to assert counterclaim challenging financial assistance program.

Affirmed.

1. **Federal Civil Procedure —103.2**

Litigant must, to satisfy standing doctrine's constitutional component, demonstrate that it has suffered actual injury or that such injury is imminent, that injury is fairly traceable to challenged conduct, and that favorable decision will likely redress injury. U.S.C.A. Const. Art. 3, § 2.

2. **Federal Civil Procedure —103.1**

Litigant must, beyond satisfying constitutional requirements of standing, show that prudential considerations do not favor judicial restraint from hearing such action; factors which discourage judicial action despite litigant's satisfaction of constitutional elements of standing include assertion of third party's rights rather than individual legal rights, allegation of generalized grievance rather than injury peculiar to litigant, or assertion of injury outside statute's or constitutional provision's zone of interests. U.S.C.A. Const. Art. 3, § 2.

3. **Federal Civil Procedure —103.1**

Parties' arguments on merits have no relevance to standing determination. U.S.C.A. Const. Art. 3, § 2.

4. **Banks and Banking —508**

Borrowers' loss of statutory defenses under Federal Deposit Insurance Act as result of FDIC's acquisition of their loan from bank was not judicially cognizable injury, for purposes of determining whether borrowers had standing to challenge FDIC's financial assistance program to bank pursuant to which borrower's loan was acquired; valid application of constitutional statute could not create cognizable harm. Federal Deposit Insurance Act. [1771]§ 2[13], as amended, 12 U.S.C.A. § 1823; U.S.C.A. Const. Art. 3, § 2.

5. **Banks and Banking —508**

Borrowers' loss of defenses as result of FDIC's acquisition of their loan from bank was not fairly traceable to assistance program to bank, but rather resulted from borrowers' failure to place alleged modifications to loan agreement in writing, for purposes of determining whether borrowers had standing to challenge assistance program, particularly in view of borrowers' knowledge of assistance program for nearly three years before their loan was acquired. Federal Deposit Insurance Act, § 2[13](c, e), as amended, 12 U.S.C.A. § 1823(c, e); U.S.C.A. Const. Art. 3, § 2.

6. **Banks and Banking —508**

Any determination that FDIC's financial assistance program to bank was invalid insofar as FDIC indirectly infused capital into bank by purchasing preferred stock from bank's holding company would not redress borrowers' alleged injury in loss of affirmative defenses upon FDIC's acquiring borrowers' loan from bank under program, for purposes of determining whether borrowers had standing to challenge legality of program. Federal Deposit Insurance Act, § 2[13](c, e), as amended. 12 U.S.C.A. § 1823(c, e); U.S.C.A. Const. Art. 3, § 2.

7. **Banks and Banking —508**

Borrowers fell outside Federal Deposit Insurance Act's zone of interests and, therefore, lacked standing to challenge FDIC's financial assistance program to lender bank, pursuant to which FDIC acquired borrowers' loan due to their failure to satisfy prudential rquirements of standing, even assuming borrowers satisfied constitutional elements of standing. Federal Deposit Insurance Act, § 2[13](c, e), as amended, 12 U.S.C.A. § 1823(c, e); U.S.C.A. Const. Art. 3, § 2.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge,
HATCHETT, Circuit Judge, and
HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Nicholas H. Morley, Interterra, Inc., and Regina Interiors, Inc. (Morley) seek review of the district court's dismissal of their counterclaim which challenged the Federal Deposit Insurance Corporation's (FDIC) financial assistance program to Continental Illinois National Bank and Trust Company of Chicago (Continental). The district court dismissed Morley's counterclaim for lack of standing, granted summary judgment against Morley, and awarded the FDIC $38,787,277.83 under notes and mortgages. We affirm.

FACTS

In April, 1981, Continental loaned Morley approximately $37,000,000. Morley borrowed this money to finance a land purchase and to construct a condominium project in Miami, Florida. Morley failed to repay the loan on November 30, 1982, the original due date. Continental granted Morley several maturity date extensions on which Morley also failed to repay the loan. After Morley failed to repay the loan in August, 1986, Continental refused to further extend the maturity date. Of the original amount borrowed, an outstanding principal [1772] of $30,942,242.73 remained. Based on Morley's failure to repay the loan nearly four years after the original due date, Continental declared the notes and mortgages in default.

PROCEDURAL HISTORY

During the lending relationship with Morley, Continental experienced severe financial difficulties. The failure of

another bank caused Continental problems with earnings, asset quality, and funding. To remedy the severe liquidity crisis which threatened to close Continental, in July, 1984 the FDIC adopted a financial assistance program to provide $4.5 billion in permanent assistance to Continental.

The FDIC devised a three-part plan to implement the $4.5 billion financial assistance program. Initially, the FDIC purchased specific troubled loans from Continental Illinois. The loans represented $4.2 billion of legal claims which Continental had previously written down to $3 billion. The FDIC assumed $2 billion of Continental's debt to the Chicago Federal Reserve Bank in exchange for these loans.

To implement the plan's second part, Continental simultaneously issued a three-year note to the FDIC for $1.5 billion. The FDIC agreed to accept $1.5 billion of additional Continental loans during the following three-year period as satisfaction for this note. In exchange for the $1.5 billion note, the FDIC assumed an additional $1.5 billion of debt which Continental owed to the Chicago Federal Reserve Bank.

The plan's third part involved an indirect capital infusion into Continental. To increase Continental's capital, the FDIC purchased $1 billion of preferred stock from Continental's holding company, Continental Illinois Corporation (CIC). More specifically, the FDIC purchased two issues of CIC non-voting preferred stock, requiring CIC to directly invest the proceeds into Continental.[1] To carry out the plan, CIC immediately invested the $1 billion in Continental.

---

[1]Although the FDIC wanted to infuse the capital directly into Continental, it purchased CIC's stock because Continental had previously issued bonds with restrictive covenants which prevented the FDIC from directly injecting the $1 billion into Continental. Moreover, time constraints prevented the FDIC from obtaining the bondholders' waiver of such covenants. *See* Note, *The Modified Payoff of Failed Banks: A Settlement Practice to Inject Market Discipline into the Commercial Banking System*, 73 Va.L. Rev. 1349, 1361 (1987).

In February, 1987, Continental transferred Morley's loan to the FDIC. The FDIC acquired Morley's loan under the assistance program's second part, the extended loan acquisition program.

In March, 1987, the FDIC sued Morley in the Southern District of Florida to collect the outstanding borrowed amount and to foreclose on the property used as collateral for the loans. Morley did not dispute his failure to repay the outstanding balance which exceeded $30 million. Despite this admission, Morley asserted several affirmative defenses to contest the FDIC's foreclosure action. The affirmative defenses include: estoppel, waiver, laches, fraud, unclean hands, illegal transfer, commercial unreasonableness, breach of fiduciary duty, breach of obligation of good faith and fair dealing, and duress. The defenses alleged additional agreements which the loan documents did not reflect. The defenses also alleged that Continental fraudulently and deceptively undermined Morley's business [1773] venture.[2] In addition to asserting the affirmative defenses, Morley counterclaimed for the court to declare the FDIC's acquisition of his loan invalid, void, and voidable because the FDIC did

[2]Morley alleged that Continental intentionally sabotaged Morley's business venture in the following ways: (1) costing Morley $4 million to buy out certain partners whom Continental convinced to abandon the project; (2) inducing Morley to change the business from condominiums to rental apartments, and then providing preferential financing to a senior loan official's friend for a competitive real estate project adjacent to Morley's apartment complex; (3) financing this adjacent complex to rent its units at a below-market price; (4) inducing Morley to invest an additional substantial sum into his project by decreasing his loan payments, with Continental agreeing to refrain from foreclosing; and (5) inducing Morley to pay substantial amounts to the bank from sources which the loan agreement did not contemplate on the condition that Continental release encumbrances on other condominiums; then failing to release these units even though Morley substantially complied with the pay down request. As a result, Morley contends that these actions coerced him to execute the loan documents which the FDIC possesses.

not conduct its financial assistance program under section 1823(c). *See* 12 U.S.C. § 1823(c) (Supp. 1988).[3]

On September 3, 1987, the FDIC moved to strike Morley's affirmative defenses and to dismiss Morley's counterclaim. The FDIC contended that section 1823(e) barred the affirmative defenses and that Morley did not have standing to contest the Continental assistance program's validity. *See*

---

[3]The relevant portion of section 1823(c) reads:

(c) Assistance to insured banks

(1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured bank—

(A) if such action is taken to prevent the closing of such insured bank;

(B) if, with respect to a closed insured bank, such action is taken to restore such closed insured bank to normal operations; or

(C) if, when severe financial conditions exist which threaten the stability of a significant number of insured banks or of insured banks possessing significant financial resources, such action is taken in order to lessen the risk to the Corporation posed by such insured bank under such threat of instability.

(2)(A) In order to facilitate a merger or consolidation of an insured bank described in subparagraph (B) with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution, or the acquisition of the stock of such insured bank, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—

(i) to purchase any such assets or assume any such liabilities;

12 U.S.C. § 1823(c) (Supp. 1988).[4] [1774] Morley conceded that section 1823(e) applied to the loans acquired under the plan's first part because such acquisition complied with section 1823(c). Morley, however, contends that because the FDIC acquired his loan nearly three years after the FDIC implemented the Continental assistance plan, section 1823(e) did not bar his defenses.

The district court rejected this contention and concluded that section 1823(e) applied to the subsequently-acquired

---

(Footnote 3 continued)

> (ii) to make loans or contributions to, or deposits in, or purchase the securities of, such insured institution or the company which controls or will acquire control of such insured institution;
>
> (iii) to guarantee such insured institution or the company which controls or will acquire control of such insured institution against loss by reason of such insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured bank or by reason of such company acquiring control of such insured bank; or
>
> (iv) to take any combination of the actions referred to in subparagraphs (i) through (iii).

[4]Section 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it *under this section*, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank. [Emphasis added.]

loans, including Morley's loan. As a result, the court held that section 1823(e) barred Morley from raising the affirmative defenses.[5]

The district court also concluded that Morley lacked standing to counterclaim for a declaration that the FDIC did not acquire his loan under a valid section 1823(c) transaction. The court found that Morley failed to satisfy the standing doctrine's "irreducible constitutional requirements." More

---

[5]The district court concluded that section 1823(e) barred all of Morley's affirmative defenses, including the duress defense. Some district courts have concluded that section 1823(e) does not bar a duress defense. *See FDIC v. Linn*, 671 F.Supp. 547 (N.D.Ill.1987). In *Linn*, the court held that a claim of economic duress fell outside of section 1823(e). Quoting a prior decision, the court stated:

> It should be noted at the outset that the language of § 1823(e) only denies validity to certain unwritten agreements, and does not bar extrinsic proof that a written document in fact does not reflect any valid agreement.

Linn, 671 F.Supp. at 555 (quoting *FDIC v. Powers*, 576 F.Supp. 1167, 1170 (N.D.Ill.1983)). Other district court decisions have similarly concluded that section 1823(e) bars only "secret agreement" defenses and not defenses such as duress which challenge the underlying loan agreement's validity. *See, e.g. FDIC v. MM & S Partners*, 626 F.Supp. 681 (N.D.Ill.1985) (section 1823 does not apply to defenses which do not arise out of an alleged collateral agreement); *FDIC v. Balistreri*, 470 F.Supp. 752 (E.D. Wis.1979) (court dismissed alleged oral promise because section 1823(e) barred it, but dismissed economic duress defense on ground that record did not establish such defense); *see also* Norcross, *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine and Federal Common Law*, 103 Banking L.J. 316, 331 (cases interpreting section1823(e) allow debtors to assert real defenses such as illegality, duress and incapacity against the FDIC).

As stated in his brief, Morley only challenged the district court's decision that he did not have standing to challenge the statutory basis for the FDIC's acquisitions of his loan. Because Morley no longer pursues his argument that even if the assistance program complied with section 1823(c), section 1823(e) does not bar the affirmative defenses, we deem it abandoned. *Rogero v. Noone*, 704 F.2d 518, 520 n. 1 (11th Cir. 1983).

specifically, the court held that Morley's injury, the loss of his affirmative defenses, was not fairly traceable to the allegedly invalid loan acquisition. Rather, the court concluded that Morley's failure to memorialize the alleged loan agreements in writing caused Morley to lose his defenses.

After striking the affirmative defenses and counterclaim, the district court granted summary judgment for the FDIC. The court held that no genuine issue of material fact existed because Morley admitted failure to repay the loans. The court subsequently ordered a foreclosure sale of the property used as collateral for the loan.

CONTENTIONS

Morley contends that the district court erred in concluding that he did not have standing to challenge the statutory basis for the FDIC's acquisition of his loan from Continental. Morley contends that he satisfied the constitutional elements for standing: **[1775]** (1) the loss of affirmative defenses constituted a cognizable injury; (2) the loss of the defenses was fairly traceable to the challenged financial assistance program; and (3) a favorable decision would redress his injury by invalidating the section 1823(e) bar to his defenses.

Morley contends that section 1823(e) does not bar his defenses because the FDIC did not acquire his loan from Continental under section 1823(c). According to Morley, the Continental assistance program did not comply with section 1823(c) because the FDIC gave money to CIC; section 1823(c) only allows the FDIC to directly assist "an insured bank" or indirectly assist an insured bank by assisting a merger or acquisition partner or such partner's holding company. *See* 12 U.S.C. § 1823(c)(1) and (2).

Finally, Morley contends that federal common law does not provide an alternative ground for affirming the district

court's decision. Although Morley recognizes that the federal common law protects the FDIC in a traditional purchase and assumption transaction, Morley contends that such protection does not extend to the Continental assistance program.

The FDIC contends that we should reject Morley's appeal for three reasons. First, the FDIC argues that it unquestionably purchased Morley's loan under section 1823(c) because it implemented the Continental assistance program within the broad discretion which 1823(c) grants it. The FDIC notes that several federal courts have held that the FDIC conducted the Continental assistance program under section 1823(c).

Second, the FDIC argues that Morley lacks standing to challenge the Continental assistance program's validity because Morley does not satisfy the standing doctrine's constitutional elements: (1) the loss of defenses does not constitute a judicially cognizable injury; (2) even if a cognizable injury exists, the assistance program did not cause it; and (3) a favorable court ruling will not redress the injury. The FDIC also argues that prudential considerations compel the court to reject Morley's standing argument because Morley, a borrower, falls outside the zone of interests which section 1823 protects.

Finally, even if section 1823(e) does not apply, the FDIC argues that federal common law protects the FDIC from Morley's affirmative defenses. According to the FDIC, the courts have consistently barred debtors' defenses under a federal policy of protecting the FDIC from alleged secret agreements between a failing bank and the bank's debtor.

ISSUE

The sole issue is: Whether Morley has standing to challenge the Continental financial assistance program's validity under section 1823(c).

DISCUSSION

Article III of the United States Constitution limits the federal courts power to resolving "cases" or "controversies." *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471, 102 S.Ct. 752, 757, 70 L.Ed.2d 700 (1982); *Saladin v. Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1987). To assure that the federal courts do not violate this restriction, we require a litigant to have standing to assert a claim in a federal court. *Valley Forge Christian College*, 454 U.S. at 471, 102 S.Ct. at [1776] 757, 70 L.Ed.2d at 708; *Saladin*, 812 F.2d at 690. A litigant has standing only when the litigant's complaint demonstrates that the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions. . . ." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962); *see Saladin*, 812 F.2d at 690.

[1] While the standing doctrine remains an elusive concept, the Supreme Court has created a useful framework for resolving standing disputes. Under this framework, the standing doctrine has two components: the "irreducible" constitutional requirements and the prudential considerations. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758, 70 L.Ed.2d at 709; *Saladin*, 812 F.2d at 690. To satisfy the standing doctrine's constitutional component, a litigant must demonstrate three elements. First, the party must have suffered an actual injury or demonstrate the imminence of such injury. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758, 70 L.Ed.2d at 709; *Saladin*, 812 F.2d at 690. Second, the injury "must be fairly traceable to the challenged conduct." *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758. Finally, the party must demonstrate that a favorable decision will likely redress the injury. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758.

[2] Beyond satisfying these constitutional requirements, a party must show that prudential considerations do not favor judicial restraint from hearing such action. The Court recognizes three factors which discourage judicial action despite a party's satisfaction of the constitutional elements: (1) assertion of a third party's rights rather than individual legal rights; (2) allegation of a generalized grievance rather than an injury peculiar to such litigant; or (3) assertion of an injury outside the statute's or constitutional provision's zone of interests. *Valley Forge Christian College*, 454 U.S. at 474-75, 102 S.Ct. at 759-60, 70 L.Ed.2d at 711; *Saladin*, 812 F.2d at 690.

[3] Before turning to the standing issue, we note that both parties' arguments on the merits have no relevance to the standing determination. Morley quotes several documents which allegedly demonstrate that the FDIC did not comply with section 1823. Similarly, the FDIC urges that its actions did not deviate from the wide discretionary boundaries which section 1823 gives it. This court and the Supreme Court have previously noted that we analyze standing questions on a complaint's allegations without considering the litigant's likelihood of success on the merits. *See Saladin*, 812 F.2d at 690 n. 4 (standing determination is a preliminary jurisdictional matter which a court must resolve without considering the likelihood of success on the merits); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975). Therefore, we do not address the arguments on the merits.[6]

---

[6]We also note that because we find that Morley lacks standing, we do not need to address the FDIC's alternate theory that federal common law bars Morley's defenses.

A. *Failure to Satisfy the Standing Doctrine's Constitutional Elements*

Morley contends that he satisfies the three constitutional standing requirements [1777] and that the prudential considerations do not support judicial abstention. In contrast, the FDIC contends that Morley does not satisfy any constitutional element and that the prudential considerations support judicial restraint. The district court only addressed the fairly traceable standing element, concluding that Morley's injury did not result from the challenged conduct. Because the FDIC contends that Morley fails to satisfy all the elements of standing, we address all the requirements. *See Saladin*, 812 F.2d at 690-91 n. 5 (court focused on actual injury requirement where the district court did not address other elements, the appellees did not contest the other requirements and the record clearly showed that the plaintiff satisfied the other requirements).

1. Actual or Imminent Injury

[4] Morley contends that he suffered an actual injury: the application of section 1823(e) caused the loss of several affirmative defenses. The FDIC contends that Morley has not suffered a judicially cognizable injury. The district court implicitly assumed that an injury existed because it addressed the fairly traceable element. We agree with the FDIC that Morley has not alleged a judicially cognizable injury.

To have standing, a litigant must have suffered a "distinct and palpable injury" rather than an "abstract" or "conjectural" injury. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556, 569-70, *reh'g denied*, 468 U.S. 1250, 105 S.Ct. 51, 82 L.Ed.2d 942 (1984); *Saladin*, 812 F.2d at 691. Although the litigant must show a concrete injury, such individual need not satisfy a quantitative threshold. *See Saladin*, 812 F.2d at 691 (no minimum quantitative limit exists). Rather, we must focus on the injury's qualitative nature.

Morley contends that the loss of defenses satisfies the concreteness standard. The one court which addressed this exact issue reached a contrary conclusion. *See FDIC v. W.H. Venture*, 607 F.Supp. 473, 475-76 (E.D.Pa. 1985). The *W.H. Venture* court noted that the loss of defenses was not a sufficient legal harm to support standing. *W.H. Venture*, 607 F.Supp. at 476. We find the *W.H. Venture* court's analysis persuasive.

In *W.H. Venture*, a debtor wanted to challenge the Continental assistance program's validity. The FDIC had acquired the debtor's loan pursuant to the financial assistance program. The court held that the debtor did not have standing to attack the plan's validity under section 1823. Although not relying on the following statements, the district court clearly expressed its view that the loss of affirmative defenses did not constitute a judicially cognizable harm:

> Naturally, anytime a party to an action loses a potential defense, they can be said to be harmed. It is not, however, 'harm' in a general sense that the law is concerned with, rather it is a specific legal harm that the court makes cognizance of in its grant of standing. . . . W.H. Venture has suffered no legal harm by the imposition of section 1823(e).

W.H. Venture, 607 F.Supp. at 476.

The valid application of a constitutional statute cannot create a cognizable harm. The statute merely serves its purpose, eliminating parties from asserting defenses. Because Morley's alleged harm is the natural consequence of a valid congressional enactment, the loss of his affirmative defenses does not constitute the specific injury necessary to confer Article III standing. [1778] *See W.H. Venture*, 607 F.Supp. at 476 (Congress intended to insulate the FDIC from a debtor's defenses).

2. Loss of Defenses Not Fairly Traceable to Challenged Conduct

[5] Assuming that Morley's loss of affirmative defenses constitutes a legal harm, Morley contends that the loss of defenses is fairly traceable to the FDIC's acquisition of its loan. Morley argues that he satisfies the fairly traceable prong because "but for" the FDIC's acquisition under section 1823(c) Morley would not have lost his defenses. The FDIC contends that Morley's failure to secure the "secret agreement" in writing caused the harm. The district court concluded that Morley failed to satisfy the fairly traceable requirement. The court held that Morley's failure to comply with section 1823(c) by securing the alleged modifications in writing caused Morley's loss of defenses. We agree with the district court's conclusion.

The fairly traceable element explores the causal connection between the challenged conduct and the alleged harm. *Allen*, 468 U.S. at 753 n. 19, 104 S.Ct. at 3325 n. 19, 82 L.Ed.2d at 571 n. 19.[7] The essential inquiry for this requirement focuses on whether "the line of causation between the illegal conduct and injury [is] too attenuated[.]" *Allen*, 468 U.S. at 752, 104 S.Ct. at 3325, 82 L.Ed.2d at 570.

Under this analysis, Morley's loss of defenses is not fairly traceable to the assistance program, but rather Morley's injury resulted from his failure to place the alleged modifications in writing. Morley knew of the assistance program since 1984; therefore, he knew that the FDIC could acquire his loan for nearly three years. As a result, Morley had constructive knowledge that if the FDIC acquired his

[7]The Supreme Court initially articulated the fairly traceable and redressability requirements as "two facets of a single causation requirement." C. Wright, Law of Federal Courts § 13 p. 68 n. 43 (4th ed. 1983).

loan, section 1823(e) would bar defenses based on oral agreements. Yet with this knowledge, Morley failed to secure the alleged agreements in writing. While the FDIC acquisition of Morley's loan barred Morley's affirmative defenses, Morley's failure to comply with section 1823(e) caused him to lose the defenses. *See W.H. Venture*, 607 F.Supp. at 476. (Continental's transfer of Morley's loan to the FDIC did not cause the alleged injury; rather, the company's failure to secure in writing its modifications in accordance with section 1823(e) caused the harm).

Beyond concluding that Morley's failure to secure the "secret agreements" in writing caused Morley's loss of defenses, we find that Morley's "but for" argument is flawed. Morley argues that but for the improper assistance program, he would not have suffered an injury. We agree with the FDIC's contention that this "but for" argument ignores the structure of the financial assistance program.

Morley only challenges the assistance program's third part, the capital infusion into CIC. Morley does not challenge the validity of the first part, and the district court rejected Morley's challenge to the second part. Given the program's separate parts, the appropriate analysis considers whether "but for" the FDIC's infusion of capital into CIC Morley would have retained his defenses. *See FDIC v. Main Hurdman*, 655 F.Supp. 259, 270 (E.D.Cal. 1987) (appropriate question is whether, but **[1779]** for infusion of capital into CIC, the party would be a defendant in the action).

In *Main Hurdman*, the court considered a nearly identical issue arising from the FDIC's acquisition of a Continental loan. Based on this loan, the FDIC sued an accounting firm for fraud, misrepresentation, and malpractice. The accounting firm argued that the CIC capital infusion exceeded the FDIC's statutory authority. The court held that the accounting firm lacked standing because the FDIC could have sued it even without the infusion of funds into CIC.

Main Hurdman, 655 F.Sup. at 270 ("There is absolutely no reason to believe that if [the FDIC injected capital directly into Continental], a different arrangement would have been made; on the contrary, it seems apparent that the exact same assignment would have resulted, and the defendant would have been sued.").

As in *Main Hurdman*, the allegedly improper capital infusion did not effect Morley because the FDIC acquired Morley's loan under a different part of the plan. Even if Morley could prove that the capital infusion fell outside section 1823(c), the FDIC acquired his loan under the assistance program's delayed loan acquisition program; the FDIC conducted this second part of the plan pursuant to section 1823(c). Consequently, Morley would have lost his defenses even without the allegedly improper infusion of capital into CIC.

3. Favorable Court Action Would Not Redress the Loss of Defenses

[6] Morley contends that a favorable court decision would redress his injury. Morley argues that if a court found that the CIC capital infusion did not comply with section 1823(c), such finding would necessarily remove the entire assistance agreement from section 1823(c). In contrast, the FDIC contends that even if a court granted Morley's declaration, the court would not order relief that would redress Morley's loss of defenses. We agree with the FDIC that any judicial relief would likely not restore Morley's affirmative defenses.

When a party contests another party's standing, the party claiming standing has the burden of proof to establish that the requested relief would redress the alleged injury. Although the redressability requirement lacks a precise definition, the Court has given some guidance. The

redressability component addresses the causal connection between the party's injury and the requested relief. *Allen*, 468 U.S. at 753 n. 19, 104 S.Ct. at 3325 n. 19, 82 L.Ed.2d at 571 n. 19. Therefore, the party must show that relief from the alleged injury will "likely" follow a favorable judicial decision. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 570 (1984).

The critical inquiry is whether "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative[.]" *Allen*, 468 U.S. at 752, 104 S.Ct. at 3325, 82 L.Ed.2d at 570. A party overcomes the speculative relief hurdle by demonstrating that a favorable judicial decision will more plausibly result in relief than not. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450, 463 (1976) (no redressability because relief too speculative; "[s]o far as the complaint sheds light, it is just as plausible that the hospitals would forgo favorable tax treatment [and therefore not remedy the harm].").

Morley argues that a favorable court decision would remedy his injury because a **[1780]** court cannot treat separately the integrated assistance program's parts. To support this conclusion, Morley quotes from the Notice of Special Meeting to the shareholders: "[t]o consider an act upon a plan . . . providing for assistance to Continental Illinois National Bank and Trust Company of Chicago . . . and a restructuring of C.I. Corp. which includes the following elements, *each of which is an integral part of a single plan.* . . ." Morley urges that this document unequivocally demonstrates that without the capital infusion into the holding company, no plan would have existed. Accordingly, the court cannot sever the holding company capital infusion program because finding such aspect outside section 1823(c) would remove the whole plan from the section.

We find Morley's claim of relief far too speculative. Even if the district court found that the CIC capital infusion did not comply with section 1823(c), Morley likely would not regain his defenses. First, the court could separate the assistance program's third part from the loan acquisition program because the FDIC clearly acquired the Continental loans, including Morley's loan, under section 1823(c). Therefore, section 1823(e) would still bar Morley's defenses.

Second, the court could hold that the assistance program constituted a valid plan even though the CIC capital infusion placed the entire plan outside section 1823(c). Under this scenario, Morley would not gain relief. Federal common law would likely bar Morley's defenses if the court concluded that the Continental assistance program was valid but not conducted pursuant to section 1823(c).[8]

---

[8]Federal common law would likely preclude Morley from raising his defenses. The federal courts have consistently precluded debtors from asserting defenses against the FDIC. *See D'Oench, Duhme and Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, *reh'g denied*, 315 U.S. 830, 62 S.Ct. 910, 86 L.Ed. 1224 (1942) (after FDIC acquired a note under a purchase and assumption program, the Court concluded that a party could not use a defense premised on an undisclosed agreement against the FDIC). Several cases decided after the enactment of section 1823(e) have applied *D'Oench* and its progeny to preclude borrowers' defenses. *See, e.g., FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984). Moreover, the courts have interpreted the *D'Oench* rule more broadly than section 1823(e), therefore it serves as a second line of defense if section 1823(e) does not bar a debtor's defenses. *See* Norcross, *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine and Federal Common Law*, 103 Banking L.J., 316, 331-32 (1980).

We have articulated the *D'Oench* doctrine as barring the assertion of defenses "when the FDIC in its corporate capacity obtains an asset in the course of a purchase and assumption transaction, for value, in good faith, and without knowledge of the defenses. . . ." *Gulf Life Ins. Co*, 737 F.2d at 1518. We do not, however, believe that the *D'Oench* doctrine only applies to a traditional purchase and assumption transaction. First, policies which support barring defenses against the FDIC in a purchase and assumption transaction equally apply to the Continental financial assistance program. Primarily, the *D'Oench* doctrine recognizes the FDIC's need to proceed

Third, if the court held the entire Continental assistance program invalid, Morley still would not gain relief. Finding the whole plan invalid would place Continental in a failing condition, requiring FDIC assistance. As a result, the FDIC would modify the plan, particularly the capital infusion section. To alleviate confusion, the FDIC would likely acquire the same loans that it presently possesses. Consequently, Morley could still not raise his affirmative defenses. Based on these plausible alternatives, we find Morley's relief argument too speculative to satisfy the redressability requirement.

(Footnote 8 continued)

quickly and therefore it bars defenses that would impede the FDIC's ability to quickly select an alternative to save the failing bank. *Gulf Life Ins. Co.*, 737 F.2d at 1517. Related to this first policy, the *D'Oench* doctrine allows the FDIC to make an informed and proper choice as to a proper alternative for assisting a failing bank without being misled by secret agreements. *Gulf Life Ins. Co.*, 737 F.2d at 1517. The Continental assistance program implicates both of these policies.

Second, several district courts have recognized the applicability of the *D'Oench* bar to debtors' defenses over Continental loans which the FDIC acquired. *See, e.g., FDIC v. W.H. Venture*, 607 F.Supp. 473 (E.D.Pa.1985); *FDIC v. Key Biscayne Development Association*, No. 84-2570-CIV-ZLOCH, slip op. (S.D.Fla. June 3, 1986), *aff'd*, 858 F.2d 670 (11th Cir. 1988). Thus, these cases have applied the *D'Oench* doctrine to the Continental direct assistance program even though it does not constitute a purchase and assumption program. Morley argues that these cases are distinguishable because in all of the cases the FDIC acquired those loans immediately; the FDIC acquired Morley's loan nearly three years after implementing the plan. We do not find this distinction persuasive. The FDIC developed its entire plan under the pressure of a bank failure. In evaluating the necessity of its action, the FDIC looked to Continental's entire loan portfolio and agreed to acquire a certain amount of loans in the future. The FDIC made this decision under severe time pressure. Furthermore, the FDIC was entitled to rely on the loan documents accurately representing the loan agreements. We see no reason not to apply the *D'Oench* doctrine to such acquisition as long as the FDIC met the other requirements of acquiring such loan in good faith and without knowledge of the defenses.

B. *Prudential Considerations Counsel Against Morley's Standing*

[7] Morley contends that the prudential considerations do not require judicial restraint in this case. The FDIC contends that even if Morley satisfied the constitutional elements of standing, Morley lacks standing because as a borrower, he falls outside section 1823's zone of interests. We agree with the FDIC that prudential considerations divest Morley of standing even if he satisfies the constitutional elements.

Not only must a party demonstrate a judicially cognizable interest, but such party must also demonstrate that such interest is arguably within the zone of interests which the statute or constitutional guarantee protects. *See Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184, 188 (1970); *Saladin*, 812 F.2d at 690. Applying this consideration, "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.' " *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399, 107 S.Ct. 750, 757, 93 L.Ed.2d 757, 769 (1987). Moreover, the Supreme Court has explained the proper analysis:

> The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed the Congress intended to permit the suit.

Clarke, 479 U.S. at 399, 107 S.Ct. at 757, 93 L.Ed.2d at 769.

Section 1823(e) absolutely precludes the assertion of defenses that do not meet its requirements. *See, e.g., Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982) (collateral oral agreement defense prohibited). Congress [1782] enacted this bar to serve two purposes. First, section 1823 facilitates the FDIC's examination and inventory of a troubled bank's assets. *See Langley v. FDIC*, 484 U.S. ____, ____, 108 S.Ct. 396, 401, 98 L.Ed.2d 340, 347 (1987) (section 1823 enables the FDIC to rely on a bank's records when evaluating a bank's assets). Section 1823 allows the FDIC to quickly develop the best remedy for a troubled bank. *See* Hearings Before the House Banking Comm. on the 1950 Amendments to Federal Deposit Insurance Act, 81st Cong., 2d Sess. 41-42 (1950); *See FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987) (the FDIC can only make such quick decisions if it can disregard "secret oral agreements that may impair the value of [the bank's] assets.").

Second, in *Langley*, the Court noted that section 1823(e) prevents bank employees and debtors from colluding to fraudulently insert new terms into an agreement when a bank faces imminent failure. Thus, section 1823(e) implements a congressional policy to not bind the FDIC to anything outside a bank's loan documents upon purchasing these documents. *FDIC v. MM & S Partners*, 626 F.Supp. 681, 687 (N.D.Ill. 1985).

Moreover, Congress designed the Federal Deposit Insurance Act (FDIA) to stabilize the national banking system and promote depositors' confidence in the system. *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir. 1982) *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). Congress enacted the FDIA to protect depositors and bank shareholders, not to protect debtors of insured banks.

These authorities strongly support the conclusion that Morley, as a borrower, falls outside the FDIA's, and in particular, section 1823's zone of interests. In fact, Congress enacted section 1823 to protect the FDIC against debtors' claims. Thus, allowing Morley to challenge the assistance program would violate the *Clarke* test because Morley's interests are patently inconsistent with section 1823.

Numerous cases have held that debtors of insured banks lack standing to challenge the FDIC's actions. For example, one district court held that a borrower lacked standing to question the legality of the FDIC's receivership or acquisition of a bank's assets. *See FDIC v. Moore*, 448 F.Supp. 493, 496 (D.C.S.C. 1978) (only the bank and its shareholders could challenge the FDIC's actions). Similarly, another district court concluded that a bank's debtors lacked standing to challenge the FDIC's decision to only accept some of the bank's liabilities. *See FDIC v. Lesselyoung*, 476 F.Supp. 938, 946 (E.D.Wis.), *aff'd sub nom. FDIC v. Lauterbach*, 626 F.2d 1327 (7th Cir. 1980). These cases support our conclusion that the FDIA does not protect debtors' interests.

C. *Common Sense Supports No Standing*

Common sense supports this conclusion. Speed is essential for the FDIC when faced with an imminent bank failure. Allowing borrowers to challenge FDIC financial assistance programs to failing banks would not only slow the FDIC, but it would render the FDIC completely ineffective. Because in most cases the FDIC acquires several bank loans, all such borrowers could challenge the FDIC's acquisition program. All of the borrowers could then stop any assistance program by challenging its validity. Given the inherent length of such litigation, such actions would preclude the FDIC from providing the essential timely assistance, and therefore from preventing threatened bank failures.

CONCLUSION

We conclude that Morley lacks standing to assert his counterclaim to challenge the validity of the Continental assistance program under section 1823(c). We hold that Morley does not satisfy any of the constitutional requirements. Furthermore, we conclude that Morley's alleged harm falls outside the zone of interests of section 1823. For these reasons, we affirm the district court's decision that Morley lacks standing to assert his counterclaim.

AFFIRMED.

[FILED MAR 15 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-0511-CIV-ATKINS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff/Counterdefendant,

v.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Defendants/Counterplaintiffs.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Third Party Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association,

Third Party Defendant.

ORDER ON MOTION TO STRIKE AFFIRMATIVE DEFENSES AND TO DISMISS COUNTERCLAIM

This cause is before the Court on Plaintiff, Federal Deposit Insurance Corporation's [FDIC] Motion to Strike Affirmative Defenses and to Dismiss Counterclaim. The Court has considered the pleadings and the relevant law, and has heard oral argument. It is thereupon

ORDERED AND ADJUDGED as follows:

1. The Motion to Strike Affirmative Defenses is GRANTED.

On September 26, 1984, pursuant to 12 U.S.C., section 1823(c), Continental Illinois National Bank and Trust Company of Chicago transferred billions of dollars in loans to the FDIC in partial consideration of FDIC's four and a half billion dollar permanent financial assistance program for Continental. Since then, Continental has transferred other loans to FDIC as part of the financial assistance program. Defendants' loans were some of those loans subsequently transferred. Defendants failed to make the required repayments, and the FDIC instituted this foreclosure action. Defendants have raised the following affirmative defenses to the foreclosure action: estoppel, laches, waiver, fraud, unclean hands, illegal transfer, commercial unreasonableness, breach of fiduciary duty, breach of an obligation of good faith and fair dealing, and duress.

Title 12 U.S.C., section 1823(e) precludes the assertion against FDIC of any defense that has the effect of modifying the agreement memoralized in the loan documents. It provides in relevant part:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it *under this section*, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board of committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

The cases construing this subsection hold that it absolutely precludes the assertion of the defenses raised by Defendants. *See e.g., FDIC v. Merchants Nat'l Bank*, 725 F.2d 634 (11th Cir. 1984) [Estoppel]; *FDIC v. Key Biscayne Dev. Assoc.*, No. 84-2570-Civ-Zloch (S.D. Fla. June 3, 1986) [Joint venture, waiver, estoppel, wrongful conduct]; *FDIC v. O'Neil*, 809 F.2d 350 (7th Cir. 1986) [Fraud]; *Continental Illinois Nat'l Bank*, No. 85-C 1968 (N.D. Ill. Dec. 2, 1986) [Estoppel, waiver, laches, accord and satisfaction, commercial unreasonableness, duress, agency/joint venture, fraud, bad faith]; *FDIC v. WH Venture*, No. 84-5673 (E.D. Pa. May 22, 1986) [Estoppel, fraud, duplicity and dishonesty, illegal conduct, waiver, unclean hands, novation, and accord and satisfaction]; *FDIC v. MM & S Partners*, 626 F. Supp. 681 (E.D. Ill. 1985) [Estoppel]; *FDIC v. Ramsey*, 612 F. Supp. 326 (E.D. Tenn. 1985) [Fraud, misrepresentation, and failure of consideration]; *FDIC v. Kucera Builders, Inc.*, 503 F. Supp. 967 (N.D. Ga. 1980) [Fraud]; *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir. 1981) [Collateral oral agreement].

The purpose behind this bar is to facilitate FDIC's ability to inventory the assets of a troubled bank.

> The purpose behind section 1823(e) enacted in 1950, is to enable the FDIC in deciding how to proceed with respect to a troubled bank to make a quick and certain inventory of the bank's assets. It can do that only if it can disregard secret oral agreements that may impair the value of those assets.

O'Neil, 800 F.2d at 353. In *FDIC v. LaRambla Shopping Center, Inc.*, 791 F.2d 215 (1st Cir. 1986), the court added:

> In light of the FDIC's need for uniformity, speed, and a sound judgment, it is not surprising that Congress limited the agreements that a debtor might raise as defenses to a FDIC claim based upon a purchased asset, to those agreements [contemplated by section 1823(e)] . . .

Id. at 220.

In *MM & S Partners*, 626 F. Supp. at 687, the court considered the needs of the FDIC when it acquires a bank asset:

> *D'Oench* and section 1823(e) demonstrates that there is a policy in federal banking law to the effect that the FDIC should not be bound by anything outside a bank's loan documents when it purchases those documents. *See D'Oench*, 315 U.S. at 457, 62 S. Ct. at 679 (federal policy to protect FDIC and the public funds which it administers against misrepresentations in the portfolio of banks; *Van Laanen*, 769 F.2d at 667 (same). *Typically*, the FDIC must move quickly in buying a bank's assets, and

> it should not be obliged to rummage through a bank's records to find the hidden value of the notes. *See Wood*, 758 F.2d at 161. *See also Harrison*, 735 F.2d at 412-13 n. 6 (federal policy to promote stability of nation's banking system by facilitating FDIC's smooth acquisition of assets). Therefore, the policy supporting FDIC protection in collateral agreement situations applies equally to all situations in which the maker's defense is based on something, representations or conduct, outside of the note itself.

The policy focuses not just on the need for speed in inventorying assets, but also on facilitating generally the FDIC's smooth acquisition of the bank's assets in order to promote stability in the banking system. The need to facilitate FDIC acquisition in order to promote stability would inhere at the time of the initial acquisition, and at the time of a subsequent acquisition made during a financial assistance plan. The allowance of the defenses would disrupt implementation of the plan, and detract from the FDIC's ability to administer it. Speed is not the only value served by section 1823(e); rather, section 1823(e) would apply equally to situations in which FDIC acquisitions would be facilitated by protecting it against collateral agreements.

Defendants argue that neither "[C]ongress nor the Courts have construed section 1823(e) as a means for the FDIC to shield itself from liability for a loan assumed three years after the initial lifesaving action." Defendants' Response at 6. However, the lifesaving action involves a longer plan in this case. The fact that it is not done with a single transfer of assets does not alter its lifesaving character. Moreover, the courts have regarded the need to shield the FDIC from liability for an assumed loan and its need to rely on bank records as critical to the effectiveness of section 1823(e). In *Langley v. FDIC*, the Supreme Court put it simply: "The short

of the matter is that Congress opted for the certainty of the requirements set forth in [section] 1823(e)." *Langley v. FDIC*, 108 S. Ct. 396 (1987). In *Langley*, the Court held that FDIC knowledge of a misrepresentation prior to its acquisition of the note is not relevant to whether section 1823(e) applies. It reasoned that "[a]n agreement is an agreement whether or not the FDIC knows of it . . ." *Id.* at 403.

Defendants do not challenge the FDIC's authority to subsequently acquire additional loans *per se*. Rather, they argue that section 1823(e)'s application to subsequent loan transfers is unconstitutional because its applicability is limited to initially assumed loans. They argue that the effect of the assistance plan is to "delegate destruction of legal rights to a private party." Defendants' Response at 16. However, as the Supreme Court noted in *Langley*, section 1823(e) sets up a "categorical recording scheme," which applies to agreements contemplated by section 1823(e). To paraphrase the Court's language in *Langley*: An agreement is an agreement whether or not the loan it modifies is initially or subsequently acquired. The need for certainty emphasized by the Court applies in both circumstances.

2. The Motion to Dismiss the Counterclaim is GRANTED.

The FDIC argues that Defendants lack standing to counterclaim for the court to declare the transfer of the loan and mortgage to FDIC void, voidable, and invalid. Defendants argue that they have standing because they are threatened with actual or prospective injury—the loss of their right to assert affirmative defenses—which can be fairly traced to FDIC's assistance plan.

> The putatively illegal conduct is the 1984 assistance agreement between the FDIC and Continental. If that agreement is invalid, then the FDIC's 1987 assumption of the . . . loan would not have occurred under the authority of that agreement. If the agreement is invalid then the Defendants/Counterplaintiffs would not be faced with 12 U.S.C., section 1823 attempts to foreclose them from asserting otherwise available affirmative defenses to the attempted foreclosure of their property.
>
> * * *
>
> "But for" the agreement there would be no FDIC action and no threatened loss of defenses . . .

Defendants' Response at 5.

One court has addressed this issue. In *FDIC v. WH Venture*, 607 F. Supp. 473 (E.D. Pa. 1985), the court held that a borrower lacks standing to challenge the legality of FDIC's action in rendering permanent financial assistance to Continental. The borrower argued that it suffered an injury when its loan was assigned to the FDIC because section 1823(e) divests its right to assert certain affirmative defenses. The Court noted that the purpose of section 1823(e) is to protect the FDIC from unverifiable verbal agreements, and observed that section 1823(e) would prevent the assertion of the defenses by the borrower. The court reasoned:

> I do not see how this result, which is the natural consequence of a congressional enacted law, can be said to illustrate the harm or injury suffered by the defendant. The harm that may result to WH Venture does not come from the assignment of the loan but rather from the defendants' own failure

> to place in writing the alleged modifications agreed to by the parties . . . Even assuming arguendo that a legal harm is present, it did not result directly from the challenged action, which is the loan transfer.

Id. at 476. The court analogized the borrower to the unsecured creditor in bankruptcy proceedings.

> Defendant has no more suffered a legal harm than has an unsecured creditor who petitions this court to enjoin a debtor from filing for bankruptcy because the creditor would be injured . . . His status as an unsecured creditor is an infirmity to collecting his debt . . . Just as Congress intended to protect certain interests of the debtor, the interests of the FDIC are protected through federal banking laws as enacted by Congress.

Id.; cf. Langley, 108 S. Ct. at 403 [recognizing harm to FDIC caused by agreements within the ambit of section 1823(e)].

Defendants argue that the *WH Venture* decision does not comport with standing law. They cite language in *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1987), to the effect that the focus of the injury is qualitative, rather than qualitative [sic], and that in addition to the constitutional requirements for standing, the court should consider certain prudential concerns which counsel judicial restraint. These include whether the alleged injury falls within the zone of interests protected by the statute, whether the complaint raises abstract questions, and whether the plaintiff is asserting its own legal rights. However, this argument overlooks the fact that the *WH Venture* court found that the borrower had not satisifed one of the "irreducible" constitutional minimum requirements for standing: whether the injury can be fairly traced to the challenged conduct. The

court traced the injury to the defendants' failure to place the alleged modifications in writing, and held that it did not result from the loan transfer. *Id.; see also Langley*, 108 S. Ct. at 403. [tracing harm suffered by FDIC and depositors to borrower's failure to "protect himself by assuring that his agreement is approved and recorded in accordance with the statute."]

Defendants attempt to extend the *WH Venture* court's analogy to the unsecured creditor. They argue that "if the creditor were seeking to declare the bankruptcy law itself unconstitutional, the injury resulting from the use of that putatively illegal law would allow the creditor to have standing to maintain a challenge to the validity ot the law which causes injury." Defendants' Response at 6. Defendants cite *Fuentes v. Shevin*, 407 U.S. 67 (1972), arguing that just as Mrs. Fuentes was able to challenge the statutes permitting pre-judgment interest [sic], so they should be able to challenge FDIC action here. However, Defendants are not challenging the constitutionality of section 1823 itself, but only its applicability to FDIC's actions. Thus, their analogies to *Fuentes* and a challenge to the constitutionality of the bankruptcy statute do not support their point.

Defendants make these arguments "[a]side from the fact that here the Defendants' cries of foul are post-takeover conduct based, and are not modifications to the loan agreement subject to being reduced to writing." Defendants' Response at 2. The fact that an agreement may occur after the initial loan transfer is not relevant under section 1823(e). The language of the section does not provide for any such limitation. Moreover, the allegations concern fraud, particularly in the quotation of the prime rate to Defendants. The fact that this conduct occurred after the initial transfer does not render it inapplicable to the loan agreement.

Defendants do not have standing to bring a counterclaim challenging the legality of FDIC's action in rendering permanent financial assistance to Continental. The Defendants' harm is fairly traceable to their loan agreements. As such, their injury is not traceable to the challenged conduct, and they have failed to [sic] the minimum constitutional requirements of standing.

DONE AND ORDERED at Miami, Florida, this 12th day of March, 1988.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: All counsel of record.

[FILED [ILLEGIBLE]]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-0511-CIV-ATKINS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff/Counterdefendant,

v.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Defendants/Counterplaintiffs.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Third Party Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association,

Third Party Defendant.

ORDER ON MOTION FOR RECONSIDERATION

This Cause is before the Court on Defendants' Motion for Reconsideration of March 15, 1988 Order or for Entry of Judgment as to Dismissed Counterclaim. Upon consideration of the pleadings, the relevant law, and the Court's Order, it is

ORDERED AND ADJUDGED as follows:

1. The Motion for Reconsideration is DENIED.

The Court finds that section 1823(e) of the Federal Deposit Insurance Act is applicable. The description of the Assistance Plan attached to Defendants' Response to Motion to Strike Affirmative Defenses recites that:

> On July 26, 1984, the FDIC approved an Agreement in Principle providing for financial assistance under Section 13(c) of the Federal Deposit Insurance Act to the Bank . . .

Appendix to Defendants' Response to Motion to Strike Affirmative Defenses at 1. Defendants' Response to Motion to Strike Affirmative Defenses cross-references the Assistance Agreement itself, included as Exhibit C in Defendants' Memorandum of Law in Support of Motion to Dismiss for Failure to Join a Party Under Rule 19. The Agreement recites that:

> CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANYOF CHICAGO . . . has applied to the FEDERAL DEPOSIT INSURANCE CORPORATION . . . for assistance under Section 13(c) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(c)). The Board of Directors of the FDIC has examined the application and such other matters as it has deemed

> appropriate and has determined, subject to the covenants and conditions of this Assistance Agreement to provide as promptly as possible on the Commencement Date assistance as follows . . .

The protective shield of section 1823(e) is applicable where bank assets are acquired by the FDIC under section 1823(c). *FDIC v. Kucera Builders, Inc.*, 503 F. Supp. 967 (N.D. Ga. 1980); *see also FDIC v. MM & S Partners*, 626 F. Supp. 681 (N.D. Ill. 1985) [Acknowledging that FDIC acquired Continental loan documents pursuant to section 1823(c) as part of the assistance plan]. Because the loan documents at issue in this cause were acquired as part of an assistance plan formulated pursuant to section 1823(c), the court finds that section 1823(e) is applicable here.

2. The Motion for Entry of Judgment as to Dismissed Counterclaim is GRANTED. Judgment will be entered accordingly.

DONE AND ORDERED at Miami, Florida, this 27th day of June, 1988.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: All counsel of record.

[FILED [ILLEGIBLE]]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-0511-CIV-ATKINS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff/Counterdefendant,

v.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Defendants/Counterplaintiffs.

NICHOLAS H. MORLEY, INTERTERRA INC.,
a Delaware corporation,
REGINA INTERIORS, INC.,
a Florida corporation, and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Third Party Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association,

Third Party Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

This Cause is before the Court on Plaintiff's Motion for Summary Judgment. Upon consideration of the pleadings, the record as a whole, and the relevant law, and after hearing oral argument, it is

ORDERED AND ADJUDGED that the motion is GRANTED.

On September 26, 1984, pursuant to an Assistance Agreement under 12 U.S.C., section 1823(c) of the Federal Deposit Insurance Act, Continental Illinois National Bank and Trust Company of Chicago transferred billions of dollars of loans to the FDIC in partial consideration for the FDIC's $4.5 billion permanent financial assistance plan for Continental. Since then, Continental has transferred other loans to the FDIC as part of the financial assistance plan. Defendants' loans were among those subsequently transferred to the FDIC. Defendants failed to make payments on the loan as required by the loan documents, and the FDIC commenced this foreclosure action.

Defendants raised affirmative defenses including estoppel, laches, waiver, fraud, unclean hands, illegal transfer, commercial unreasonableness, breach of fiduciary duty, breach of an obligation of good faith and fair dealing, and duress. Defendants also counterclaimed to have the loan transfer to the FDIC declared void, voidable, and invalid. On March 12, 1988, this Court granted the FDIC's motion to strike the affirmative defenses pursuant to section 1823(e) and to dismiss the counterclaim.

Summary judgment is mandated against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). The existence of some evidence to support the nonmoving party's position is insufficient to avoid summary judgment; the judge's inquiry concerns whether reasonable jurors could find by a preponderance of the evidence in a civil case that the nonmoving party is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

Defendants do not dispute that they have failed to make the required payments on the loans. On the present record, considering that the affirmative defenses have been stricken, the Court finds that there exists no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c).

DONE AND ORDERED at Miami, Florida, this 27th day of June, 1988.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: All counsel of record.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 88-6012

NICHOLAS H. MORLEY; INTERTERRA, INC.,
a Delaware corporation;
REGINA INTERIORS, INCORPORATED,
a Florida corporation; and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Defendant-Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Appellee.

Appeal from the United States
District Court For The
Southern District of Florida

BRIEF OF APPELLANTS

DENNIS ALAN RICHARD, Esquire
RICHARD AND RICHARD
825 South Bayshore Drive
Tower III—Suite 1748
Miami, Florida 33131
(305) 374-6688
and
BRUCE S. ROGOW, Esquire
2097 S.W. 27th Terrace
Fort Lauderdale, Florida 33312
(305) 524-2465

Counsel for Appellants

* * *

The loan was not paid on August 1, 1986. An outstanding principal remained of $30,942,242.73 (RE 24); Continental declared the notes and mortgages in default, transferred the loan to the FDIC, and shortly thereafter the FDIC initiated foreclosure proceedings.

B. *Continental's Problems And The Transfer of The Loan*

Continental Illinois was in trouble. On July 26, 1984 the FDIC approved an agreement to assist Continental, an agreement which prompted Donald T. Regan, then Treasury Secretary, to write to Paul Volcker, then Chairman of the Federal Reserve Board:

> [W]e oppose proceeding with the Continental Illinois assistance package. . . . *We believe it* is bad public policy, would be seen to be unfair vis-a-vis past FDIC/Federal Reserve Bank supervisory policies, and *represents an unauthorized and unlegislated expansion of federal guarantees in contravention of Executive Branch policy which lacks explicit Congressional authorization.*
>
> (RE 125). (emphasis supplied).

Secretary Regan's letter was based on the advice of the Acting General Counsel to the Treasury who concluded:

> In light of the existence of at least one alternative financing plan that is clearly legal and the serious legal questions raised by the FDIC's proposed plan, the sounder legal course would be to choose one of the alternatives.
>
> (RE 136).

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2032

In the Supreme Court of the United States

OCTOBER TERM, 1989

NICHOLAS H. MORLEY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN L. DOUGLAS
General Counsel

MARK I. ROSEN
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

JOHN DAVID FERRER
Counsel

JACLYN C. TANER
Senior Attorney
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly held that, where the Federal Deposit Insurance Corporation acquired a note from a troubled bank in a financial-assistance transaction, debtors of the assisted institution lacked standing to challenge the statutory basis for the assistance plan.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	7, 9
Association of Data Processing Service Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970)	10
Clarke v. *Securities Industry Ass'n*, 479 U.S. 388 (1987)	6, 10, 11
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	6
FDIC v. *Freudenfeld*, 492 F. Supp. 763 (E.D. Wis. 1980)	9
FDIC v. *Lesselyoung*, 476 F. Supp. 938 (E.D. Wis.), aff'd, 626 F.2d 1327 (7th Cir. 1980)	9
FDIC v. *Main Hurdman*, 655 F. Supp. 259 (E.D. Cal. 1987)	7, 8
FDIC v. *Moore*, 448 F. Supp. 493 (D.S.C. 1978)	10
FDIC v. *WH Venture*, 607 F. Supp. 473 (E.D. Pa. 1985)	7
Langley v. *FDIC*, 484 U.S. 86 (1987)	4
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)	9

Constitution and statutes:

U.S. Const. Art. III	7, 9
Administrative Procedure Act, 5 U.S.C. 702	10

Statutes—Continued: Page

Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* 6
12 U.S.C. 1823 ..... 6, 9
12 U.S.C. 1823(c) 3, 4, 6, 7, 8, 10
12 U.S.C. 1823(c)(1) 2
12 U.S.C. 1823(e) 3, 4, 5, 6, 8, 9
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217 (Aug. 9, 1989) 4

Miscellaneous:

H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. (1989) 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2032

NICHOLAS H. MORLEY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 867 F.2d 1381. The orders of the district court (Pet. App. 26-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1989. The petition for a writ of certiorari was filed on June 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1981, Continental Illinois National Bank and Trust Company of Chicago, an institution insured by the Federal Deposit Insurance Corporation, loaned peti-

tioners $37,000,000. Petitioners used the proceeds to purchase land and to construct a condominium project in Miami, Florida. Petitioners defaulted on their repayment obligation in November 1982. After a series of extensions on the loan maturity date, Continental in August 1986 refused to grant any further extensions and declared the notes and mortgages in default. Petitioners still owed Continental almost $31,000,000 in outstanding principal. Pet. App. 4.

By 1984, Continental itself had encountered severe financial difficulties. In significant part as a result of nonperforming loans, the bank had trouble meeting short-term funding requirements. In July 1984, the FDIC approved a plan to provide $4.5 billion in assistance in order to alleviate the bank's liquidity crisis and to prevent the bank's closure. Pet. App. 4-5.[1]

The assistance plan had three parts. Under the first part, Continental transferred to the FDIC $2 billion worth of troubled loans, in exchange for which the FDIC assumed $2 billion of Continental's debts. Under the second part, Continental gave the FDIC a note for $1.5 billion, which, it was agreed, could be paid off by Continental's delivering to the FDIC $1.5 billion in additional loans over the succeeding years. In exchange, the FDIC agreed to assume an additional $1.5 billion in debt that Continental owed to the Federal Reserve Bank of Chicago. Under the third part

---

[1] Under 12 U.S.C. 1823(c)(1), the FDIC is authorized "to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured bank" in order to prevent closure of the bank and to lessen the risk to the FDIC insurance fund posed by the instability of insured banks with significant financial resources. See Pet. 3-4; Pet. App. 7. The statute also provides that the FDIC may carry out the specified actions "in its sole discretion and upon such terms and conditions as the [FDIC's] Board of Directors prescribe." 12 U.S.C. 1823(c)(1).

of the assistance plan, the FDIC, in order to infuse additional capital into Continental, purchased $1 billion of preferred stock from Continental's holding company, Continental Illinois Corporation (CIC), which agreed to invest in the bank the $1 billion it received from the FDIC. Pet. App. 5.[2]

In February 1987, the FDIC acquired petitioners' loan from Continental. The acquisition occurred pursuant to the second part of the 1984 assistance plan, which allowed Continental to pay off its $1.5 billion note to the FDIC by transferring loans to the FDIC. Pet. App. 6.

2. In March 1987, the FDIC sued petitioners in the United States District Court for the Southern District of Florida, seeking to collect the outstanding borrowed amount and to foreclose on the property used as collateral. Petitioners, who did not dispute their failure to repay the outstanding balance, asserted several affirmative defenses, such as estoppel, waiver, fraud, and breach of fiduciary duty, all based on an alleged oral agreement between petitioners and Continental. Petitioners also counterclaimed for a declaration that the FDIC's acquisition of the loan was invalid. They asserted principally that the purchase of the holding company's stock as a means of infusing capital into the bank was beyond the authority granted the FDIC by 12 U.S.C. 1823(c). Pet. App. 6-7.

On the FDIC's motion to strike the affirmative defenses and to dismiss the counterclaim, the district court ruled first that the defenses were barred by 12 U.S.C. 1823(e). That provision protects the FDIC against the assertion of defenses based on unwritten side agreements that would

---

[2] The bank's previous issuance of bonds containing restrictive covenants prevented the FDIC from injecting capital directly into the bank; there was not sufficient time for the FDIC to secure the bondholders' waiver of the covenants. Pet. App. 5 n.1.

diminish or defeat the FDIC's interest in a note acquired pursuant to Section 1823. See *Langley* v. *FDIC*, 484 U.S. 86 (1987).[3] The district court held that the provision applied to petitioners' loan, and barred the defenses. Pet. App. 7-9; *id.* at 26-31.[4]

The district court also held that petitioners lacked standing to maintain their counterclaim challenging the validity of the Continental assistance plan. The court concluded that the harm suffered by petitioners—the loss of their affirmative defenses—was caused by their own failure to place in writing the alleged unrecorded modifications to their loan agreements, but was not fairly traceable to the allegedly invalid assistance plan. Pet. App. 31-35. Accordingly, the court struck the counterclaim as well as the affirmative defenses and, because there was no dispute about petitioners' failure to repay their loans, granted summary judgment to the FDIC and ordered a foreclosure sale. *Id.* at 9-10, 31-41.

3. The court of appeals affirmed. Pet. App. 1-25. Petitioners' sole contention was that Section 1823(e), which they now conceded would bar their defenses to repayment if it applied, was inapplicable because the FDIC did not lawfully acquire their loan under Section 1823(c). They argued that the FDIC financial assistance plan was unauthorized by statute because the FDIC paid money to the bank holding company rather than to the

---

[3] Section 217 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (Aug. 9, 1989), amends 12 U.S.C. 1823(e), but the changes are not material to the present case. See H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 79 (1989).

[4] The district court rejected petitioners' argument that Section 1823(e) did not, and could not, apply to loans that were acquired by the FDIC after the initial transfer of assets under the assistance plan in 1984. Petitioners did not challenge that ruling in the court of appeals (see Pet. App. 9 n.5) and do not challenge it in this Court.

bank. The court of appeals, declining to address the merits of petitioners' contention, held that petitioners did not have standing to challenge the lawfulness of the assistance plan. Pet. App. 12-25.

The court found that petitioners failed to meet any of the minimum constitutional requirements for standing. The court first concluded that petitioners' alleged injury—the loss of affirmative defenses—was not judicially cognizable. The court reasoned that this loss was "the natural consequence of a valid congressional enactment" (12 U.S.C. 1823(e)). Pet. App. 14-15.

The court next ruled that petitioners' loss of their defenses was, in any event, not fairly traceable to the 1984 assistance plan. First, the court concluded, the loss of defenses was the direct result of petitioners' own failure to secure the alleged agreements in writing in conformity with Section 1823(e), a failure that persisted throughout the three years between 1984 and the FDIC's 1987 acquisition of their loan even though petitioners knew the FDIC could acquire the loan at any time. In addition, the court concluded, the alleged wrong—the FDIC's infusion of money into CIC, the bank holding company—was not a cause of petitioners' loss of defenses, because the CIC capital infusion took place under a part of the assistance plan quite separate from the part, whose legality is not challenged, under which the FDIC acquired petitioners' loan. The court therefore ruled that petitioners "would have lost [their] defenses even without the allegedly improper infusion of capital into CIC." Pet. App. 18; see *id.* at 16-18.

The court of appeals also held that, even if the district court were to agree with petitioners' claim that the CIC capital infusion was unlawful, the relief would not likely restore petitioners' defenses. First, the district court could separate the three parts of the assistance plan, leaving the

loan-acquisition portions in place and Section 1823(e) applicable. Second, the trial court could find the assistance plan valid even though not authorized by Section 1823(c), in which event, the court of appeals observed, the federal common law doctrine of *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942), would likely preclude petitioners' defenses. Pet. App. 20-21 n.8. Third, if the trial court found the entire assistance plan invalid, petitioners still would not gain relief. Such a finding, the court of appeals explained, would place Continental in failing condition and in need of FDIC assistance. The result would be that the FDIC would modify the 1984 assistance plan, and the desire to avoid confusion would likely lead the FDIC to acquire the same loans it already possesses, including petitioners'. Pet. App. 18-21.

Having found no constitutional standing, the court of appeals also ruled that prudential considerations defeated standing. Citing *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), the court held that a bank's debtors fall outside the zone of interests protected by the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, and Section 1823 in particular. The court explained that the Act in general, and Section 1823 especially, were enacted to protect the interests of depositors and bank shareholders, not the interests of debtors; indeed, it was debtors that Section 1823 was specifically designed to protect depositors and shareholders *against*. Pet. App. 22-24.

Finally, the court of appeals concluded that common sense counsels against recognizing petitioners' standing. The court observed that, in devising assistance plans designed to prevent bank failures, the FDIC must act expeditiously. Permitting challenges to assistance plans by the numerous debtors whose loans are routinely acquired

in such plans would greatly impair the FDIC's ability to offer timely assistance to troubled banks. Pet. App. 24.

ARGUMENT

The court of appeals' holding that petitioners lacked standing to contest the validity of the FDIC's 1984 financial assistance plan for Continental is correct and does not warrant this Court's review. Petitioners do not allege that the ruling of the court of appeals conflicts with any decision of any other court of appeals; and in fact, no court has held that debtors may challenge a financial assistance plan like the one at issue here.[5] Nor is there any other reason suggesting that the issues presented are of special importance.

1. The court of appeals correctly concluded that petitioners failed to meet the minimal Article III requirements of standing. See *Allen* v. *Wright*, 468 U.S. 737, 751 (1984) (Article III requires that plaintiff have suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"). In particular, as the court of appeals held (Pet. App. 16-18), petitioners' asserted injury (the loss of an opportunity to establish their affirmative defenses) was not fairly traceable to the allegedly illegal action of the FDIC (the infusion of funds into CIC, the bank holding company, allegedly in excess of the authority granted to the FDIC by Section 1823(c)).

---

[5] Two district courts have held that obligors – in one case a borrower, in the other an accountant malpractice defendant – lacked standing to challenge the Continental assistance plan because their alleged injury was not fairly traceable to the plan. *FDIC* v. *Main Hurdman*, 655 F. Supp. 259 (E.D. Cal. 1987); *FDIC* v. *WH Venture*, 607 F. Supp. 473 (E.D. Pa. 1985).

The alleged illegality occurred in a part of the assistance plan that was separate from the part under which the loan was acquired. The latter part, involving the FDIC's assumption of debts owed by Continental in exchange for certain assets plus a note that could be paid off by Continental's transferring other loans to the FDIC, is not challenged as illegal, and it stands independently of the CIC capital infusion part of the plan. The alleged legal defect in the CIC capital infusion was not the but for cause of the FDIC's acquisition of petitioners' loan pursuant to the loan-acquisition portion of the assistance plan. As the district court concluded in *FDIC* v. *Main Hurdman*, 655 F. Supp. 259, 270 (E.D. Cal. 1987), "[t]here is absolutely no reason to believe that if [the FDIC had injected capital directly into Continental]"—which would have eliminated the basis for petitioners' allegation of illegality under Section 1823(c)—"a different arrangement would have been made; on the contrary, it seems apparent that the exact same assignment [of petitioners' loan] would have resulted." Any contrary assumption is thus too speculative to support a claim of standing.

In addition, even if the loss of defenses had some nexus to the CIC capital infusion, that nexus was broken by petitioners' own conduct following the implementation of the assistance plan. Petitioners knew from 1984 until the FDIC acquired their loan in 1987 that the FDIC could acquire the loan at any time pursuant to the loan-acquisition portion of the assistance plan. Pet. App. 16-17. Yet petitioners failed to take any steps to place in writing, and otherwise to bring into conformity with Section 1823(e), the alleged agreements that they later asserted as defenses against the FDIC when it acquired their loan. Since petitioners were on notice of the potential loss of defenses, that failure was an intervening cause that, in itself, renders

any connection between the alleged injury and the 1984 CIC capital infusion far "too attenuated" to support standing. *Allen* v. *Wright,* 468 U.S. at 752; see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-44 (1976).[6]

2. The judgment below is also independently supported by the court's additional holding that the prudential zone-of-interests analysis precluded petitioners' standing.[7] Petitioners do not dispute the court of appeals' conclusion that their interests as debtors are not within the zone of interests protected by the Federal Deposit Insurance Act in general and Section 1823 in particular. In fact, Section 1823 and the other provisions of the Act are designed to protect the interests of depositors and shareholders, whose claims against troubled banks depend on the FDIC's exercise of its duties and authority under the Act; they are not designed to protect the interests of debtors, whose obligations to the banks are the banks' principal assets. Indeed, to the extent that Section 1823 addresses debtors, it is specifically to protect banks *against* debtors' assertion of various interests. See 12 U.S.C. 1823(e).[8]

---

[6] Because the fair traceability component of Article III standing is not satisfied, the court of appeals' more problematic rulings regarding the injury-in-fact and redressability components were not necessary to its constitutional holding.

[7] The question presented in the petition (Pet. i) challenges only the court of appeals' constitutional holding and thus does not encompass the court's prudential zone-of-interests ruling. In the "reasons for granting the petition" portion of their filing, petitioners do challenge the zone-of-interests ruling.

[8] Cf. *FDIC* v. *Freudenfeld,* 492 F. Supp. 763, 768-769 (E.D. Wis. 1980) (debtors have no standing to challenge receiver's distribution of assets); *FDIC* v. *Lesselyoung,* 476 F. Supp. 938, 946 (E.D. Wis.), aff'd, 626 F.2d 1327 (7th Cir. 1980) (debtors have no standing to

Petitioners contend, instead, that the case presents the question whether the zone-of-interests test should "cut against Article III standing." Pet. 12. They also suggest that the test applies only to claims for review of agency action under the Administrative Procedure Act (APA), 5 U.S.C. 702 (authorizing judicial review by any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute") and is for that reason not applicable here. Pet. 13. Those contentions are without merit.

a. The court of appeals did not apply the zone-of-interests test as part of its constitutional inquiry. Rather, in accordance with well-established precedent (*Clarke* v. *Securities Industry Ass'n, supra*; *Association of Data Processing Service Orgs., Inc.* v. *Camp,* 397 U.S. 150, 153 (1970)), the court applied the test as an additional, non-constitutional requirement that a litigant must meet when, as here, the litigant makes a claim under a statute. Pet. App. 22.

b. Petitioners' APA argument is misplaced for several reasons. First, the present case involves the filing of a counterclaim that, in fact if not by virtue of petitioners' express allegations, falls squarely under Section 702 of the APA: petitioners have alleged that the FDIC, a governmental agency, took action in excess of its authority under 12 U.S.C. 1823(c). Second, to the extent that Section 702 of the APA is not applicable here, petitioners' reliance on *Clarke* cannot aid them: *Clarke* did not hold that the zone-of-interests test was limited to APA claims; it stated only

---

challenge FDIC's refusal to accept all liabilities in connection with transferred assets); *FDIC* v. *Moore,* 448 F. Supp. 493, 496 (D.S.C. 1978) (borrower has no standing to challenge legality of FDIC's acquisition of bank assets).

that the "principal" cases in which the test has been applied have involved such claims. Indeed, the Court in *Clarke* suggested that *more* stringent prudential standing requirements for claiming a statutory violation apply where the " 'generous review provisions' " of the APA are inapplicable. 479 U.S. at 400 n.16. In the present setting, prudential considerations weigh heavily against standing, for, as the court of appeals explained (Pet. App. 24), allowing debtors to challenge an assistance plan (perhaps years after its implementation) would impair the FDIC's ability to take the speedy action required to forestall bank failures and to protect the depositors and shareholders who are within the zone of interests protected by the Federal Deposit Insurance Act.[9]

[9] Contrary to petitioners' suggestion (Pet. 12, 14), the court of appeals did not rule that free-standing common sense considerations defeat otherwise-available standing. Rather, as the court explained (Pet. App. 24), its conclusion that debtors are outside the zone of protected statutory interests was supported by consideration of the practical impact that debtor standing on this issue would have on the intended functioning of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN L. DOUGLAS
General Counsel

MARK I. ROSEN
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

JOHN DAVID FERRER
Counsel

JACLYN C. TANER
Senior Attorney
Federal Deposit Insurance Corporation

AUGUST 1989

U.S. GOVERNMENT PRINTING OFFICE 1989 – 241 699 00406

SEP 22 1989

JOSEPH F. [illegible] JR.
CLERK

NO. 88-2032

in the

Supreme Court

of the

United States

NICHOLAS H. MORLEY; INTERTERRA, INC.,
a Delaware corporation;
REGINA INTERIORS, INCORPORATED,
a Florida corporation; and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

BRUCE S. ROGOW, Esquire
NOVA UNIVERSITY LAW CENTER
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465
and
DENNIS ALAN RICHARD, Esquire
RICHARD AND RICHARD
825 South Bayshore Drive
Tower III—Suite 1748
Miami, Florida 33131
(305) 374-6688

Counsel for Petitioners

TABLE OF CONTENTS

PAGE

A. CONFLICT 1

B. THE FDIC FAILS TO FINESSE FAIRLY TRACEABLE 2

TABLE OF AUTHORITIES

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1978) 2

Title 12 U.S.C. §§ 1823(c) and (e) 1

PETITIONERS' REPLY

A. *The Conflict*

Contrary to the FDIC's view that this is a counterclaim attack on the FDIC's statutory powers (see argument below), this case does not turn on any counterclaim. The FDIC put its statutory powers into issue by asserting that it acquired Petitioners' loan under § 1823(c). That assertion was necessary in order for the FDIC to raise the § 1823(e) shield, which does not otherwise apply. Petitioners denied that the loan was acquired under § 1823(c). The FDIC does not contest that if Petitioners are correct, the § 1823(e) shield is unavailable; however, it maintains the Petitioners do not have standing to deny that the loan was so acquired. More particularly, the FDIC argues that Petitioners have no standing to deny FDIC allegations which were necessary in order for it to proceed with its case.

Nevertheless the FDIC recognizes the standing question posed by the Petitioners is substantial. It acknowledges that the decision below conflicts with two-thirds of this Court's standing analysis. The FDIC notes:

> Because the fair traceability component of Article III standing is not satisfied, the court of appeals' more problematic rulings regarding the injury-in-fact and redressability components were not necessary to its constitutional holding.
>
> Brief in Opposition, p.9, n.6.

Thus in its subtle way, the FDIC concedes conflict between this Court's cases and the decision below with regard to injury-in-fact: The Petitioners are injured by not being able to raise lawful defenses. The FDIC similarly concedes conflict with regard to redressability: If the loan was not acquired

under § 1823(c), then the immediate injury (loss of defenses pursuant to § 1823(e)) would be redressed by a decision saying the loan was not acquired under § 1823(c).

Consequently, only the "fairly traceable" component seems to prevent Petitioners from a clean sweep conflict on standing, even in the FDIC's view.

Fairly analyzed, the decision below also presents "fairly traceable" conflict. There is a nothing speculative about whether a loan was taken or not taken under § 1823(c), and the consequent availability or non-availability of defenses. The connection is direct. If a loan is taken under § 1823(c), then § 1823(e) provides a shield to the Petitioners' defenses. Simply put, if the Petitioners' loan was not taken under § 1823(c), the loss of defenses "fairly can be traced to the challenged action. . . ." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1978). The challenged action is the FDIC's assertion of a statutory protection to which it may not be entitled.

B. *The FDIC Fails to Finesse Fairly Traceable*

The FDIC's tack is to load the question presented with non-issues. It states the question to be "[w]hether the court of appeals correctly held that debtors of the assisted institution lacked standing *to challenge the statutory basis for the assistance plan.*" Brief in Opposition, p.I (emphasis supplied).

But the certiorari petition in this case does not present a question of a statutory challenge to the validity of the Federal Deposit Insurance Corporation's assistance plan to Continental Illinois National Bank and Trust Company of Chicago. The petition does not present any questions regarding any "alleged illegality" in the assistance plan. Brief in Opposition, p.8. The petition does not present the

question of whether the FDIC actions were "allegedly in excess of [its] authority." Brief in Opposition, p.7. The petition does not present a factual question of whether the assistance plan was composed of parts which could be separated, and thus saved from illegality. Brief in Opposition, p.8.[1]

Those arguments intentionally miss the point of the petition. The issue is not standing to challenge the Continental bail out; the issue is whether the Petitioners have standing to deny the allegation that this loan was acquired under Section 1823(c). The answer to that ultimate question is simply yes or no. The answer poses no danger to ordered liberty in the banking world. An ultimate yes only leads to a right to present defenses. An ultimate no means no right to present defenses.

Saying the Petitioners have no right to question the FDIC's assertion poses a danger to liberty. That conclusion places the FDIC's assertions beyond judicial inquiry, making standing a synonym for silencing a citizen's right to ask a fair question. Not even a national banking problem requires that oppressive result.

---

[1]By arguing divisibility, the FDIC raises a factual issue which relates to the merits, not standing, and which, on its merits, favors the Petitioners. The notice of special meeting of Continental shareholders called them to meet. . .

> (1) To consider and act upon a plan (the "Plan") providing for assistance to Continental Illinois National Bank and Trust Company of Chicago (the "Bank") and a restructuring of CI Corp. which includes the following elements, *each of which is an integral part of a single plan* . . . (emphasis supplied).

Respectfully submitted,

BRUCE S. ROGOW, Esquire
NOVA UNIVERSITY LAW CENTER
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465
and
DENNIS ALAN RICHARD, Esquire
RICHARD AND RICHARD
825 So. Bayshore Drive
Tower III—Suite 1748
Miami, Florida 33131
(305) 374-6688

BY: _____
BRUCE S. ROGOW

September 21, 1989